



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,941	01/03/2002	Carolyn Jean Cupp	112701-330	7917
29157 7590 08/13/2007 BELL, BOYD & LLOYD LLP P.O. Box 1135 CHICAGO, IL 60690			EXAMINER SAYALA, CHHAYA D	
			ART UNIT 1761	PAPER NUMBER
			NOTIFICATION DATE 08/13/2007	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

Office Action Summary

Application No.

10/037,941

Applicant(s)

CUPP ET AL.

Examiner

C. SAYALA

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-33 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Reopening of Prosecution After Appeal

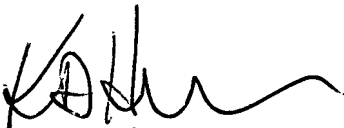
In view of the appeal brief filed on 12/5/2006, PROSECUTION IS HEREBY REOPENED. New grounds of rejection are set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:


KEITH HENDRICKS
PRIMARY EXAMINER

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-20, 25-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hand et al. (US Patent 5431927) and Collings et al. (EP 0645095) in view of Speck et al. (US Patent 6025004) and Procter (US Patent 4259361).

Hand et al. teach a pet food product made from fiber, containing protein and carbohydrate having a thickness 0.32-0.70 inch (col. 5, line 10), a length 0.32-0.75" (col. 7, lines 22-23). The width is not given and neither is the Office equipped to manufacture prior art products and compare physical dimensions or characteristics that applicant has chosen to describe his product with, with the claimed invention. Col. 8, line 17 teaches that the thickness is 0.5 inch. The product is obtained after an extrusion process and therefore it would be inherent that the protein would have been denatured and the carbohydrate gelatinized. The fiber content is given as between 10-25%. See col. 5. While the fact that little or no humectant is added to produce hard textured pet food products is well known in prior art, this patented product also does not disclose the addition of a humectant. The product is used for oral care, that reduces teeth plaque, stain and tartar. The patent teaches a product with a density between 10 to 35 lbs/cu' (see col. 4, line 44). At col. 5, lines 5-12, patentees state:

Art Unit: 1761

While the striated product of the present invention can be any of several shapes, the shapes which are most desirable for mechanical cleaning efficacy include a cylindrical or disc shape. Disc-shaped pellets having thickness of about 0.32 to 0.70 inch, a diameter of about 0.7 to about 1.2 inch are most preferred in the practice of the present invention. (emphasis added).

The patent does not teach that its product is unstriated. However, the patent teaches that apart from its expanded striated product obtained "by creating conditions during the extrusion of the product resembling laminar flow", and by maintaining the inner walls of the passageway at a coefficient of friction no greater than 0.2", i.e. "conditions resembling laminar flow", that produces an extrudate having striated structural matrix (col. 3, line 55 to col. 4, line 3), it is possible to produce, in contrast, fiber containing products extruded under conditions of *turbulent flow* with the fibrous ingredients randomly distributed in the food product (col. 3, lines 48-50). See col. 2, lines 44-56, that shows the contrast. See also col. 4, line 15+, that clearly delineates conditions for such a laminar flow process:

Typically, a condition resembling laminar flow is obtained in the extrudate of the present invention by passing the plasticized food ingredient mixture, heated to a temperature of about 240.degree. to about 320.degree. F. and preferably about 270.degree. to 300.degree. F. at a relatively low velocity, e.g. about 12 to about 20 in./sec., preferably about 13 to about 17 in./sec. and most preferably about 14 to about 16 in./sec., through a discharge passageway having a length of about 2 to about 4 inches and a diameter of at least about 0.35 inches and preferably about 0.5 to about 0.75 inches, the inner walls of the passageway being coated with a layer of polytetrafluoroethylene.

Therefore, by simple logic and scientific reasoning, extruding under conditions of turbulent flow, and using a coefficient of friction for the discharge passageway, which is way greater than 0.2, one of ordinary skill in the art would have reasonably expected a product that is not striated, and therefore of a different texture. Thus, Hand et al. teach the conditions necessary to make both the unstriated and striated pet food product, but exemplify only the striated product. Thus, while the ingredients are the same as claimed herein, the dimensions are comparable to those claimed, and are clearly illustrated as being of a size and shape so as to obtain the "most desirable " mechanical cleaning efficiency, the density is not the same and the product is striated.

Such an unstriated product described by Hand et al. is shown by Collings et al., wherein this reference teaches no humectant and teaches all the other limitations but not the dimensions of the product as claimed, or its density and does not subject the product with any of the conditions during extrusion as shown for the laminar product. Collings et al. disclose an extruded dog treat food product which comprises a structural matrix containing proteins, starches, carbohydrates and fiber such as cellulose (pg. 3). A typical cellulose fiber content is shown to be in the range of 2-10%. The mixture containing the starch and protein is gelatinized ("plasticized"), due to the high-temperatures of the extrusion process disclosed, and thus the end product contains denatured protein, as well as gelatinized carbohydrate. It is noted that the extrusion is done with a "heatable extruder having one or more helical transfer screws axially rotatable...., with a restricted extrusion discharge passageway" (pg. 3, lines 38-52), serving to cook and plasticize the mixture, thus providing a non-laminar flow of the

Art Unit: 1761

mixture through the chamber(s). Following extrusion, the pet food thus produced has a final moisture level of about 6-10% (top of page 4). Further, Collings et al. does not teach the use of a humectant. At mid-page 2, reference is made to a then copending application, 07/899,534, now US Patent 5431927 to Hand et al. (applied here), directed to a striated pet food, and at lines 30-40 of page 2, it is stated that, in contrast, Collings et al. are disclosing the production of a non-striated product, i.e. "a product that was not in a stratified condition."

When it was attempted to adapt the composition and process conditions of SN 07/889,534 to the manufacture of a dog treat food product, that is, a product that was not in a stratified condition, it was determined that the extruded, expanded dog treat product did not have sufficient structural integrity to withstand breakage due to drop impact, i.e., the product could not satisfactorily withstand the impacting internal pressure when the container in which the dog treat product was packaged was dropped during handling and use.

However, at page 4, line 1+, patentees of the EP patent, disclose the solution to this, thus:

In preparing the final dog treat food product, the final moisture content of the expanded extrudate piece, is an important feature of the present invention. To obtain an acceptable breakage resistant product, the moisture content of the final product is adjusted to the range of about 6 to about 10%. Preferably the moisture content is reduced to about 7 to about 9% by weight. At moisture levels below 6% the product becomes extremely fragile. At moisture levels above about 10%, the risk of mould growth significantly increases.

In the step of drying the extruded food products to achieve the desired final moisture level, the relationship between the drying

Art Unit: 1761

temperature and the length of time for the drying step, is a critical feature in the manufacture of the dog treat product of the present invention. Thus, the drying process used to obtain the final moisture level in the dog treat product requires extremely careful control of the temperature and humidity and must be done relatively slowly in order to produce a product of satisfactory breakage resistance. If the drying is carried out too quickly, i.e., at too high a temperature, e.g. above about 250°F (121°C), the dried pieces or chips of extruded product will be fragile and exhibit high breakage rates. Drying carried out too quickly, will "case harden" the extruded chips creating internal microfissures which render the product vulnerable to fragmentation along the microfissure lines.

Thus, while the patent to Hand et al. teaches the principles of obtaining the different textures, both striated and unstriated, and exemplifies one, Collings et al. exemplify the other. Furthermore, Collings et al. teach a product that resists breakage, an advantage that would be seen as beneficial by one of ordinary skill in the art, in the use of an extruded dry pet food product that has sufficient structural integrity, to be used to effectively remove tartar, stain and plaque.

Collings et al. do not teach the density of their product. Nevertheless, Speck et al. establish that it was known in the art at the time the invention was made to adapt an extruder's flow characteristics in order to control the density of kibbles, and therefore to optimize such parameters so as to obtain a density within the range shown by Hand et al. and as claimed herein, would have been within the realm of the skilled person, since Hand et al. shows that the density was for a product that had a benefit: improved oral care. With respect to claims 28-33, since Collings et al. teach non-laminar flow extrusion, then it follows that the inner cellular structure, circular pores and sponge-like

structure would result. Compare the extrusion conditions at col. 4 in '927 and pages 3-4 in '095, although the same extruders are used by both patents.

As for the dimensions of the kibble, while Hand et al. disclose the length and thickness which fall within the claimed dimensions and discloses *any suitable shape such as cylindrical or disc-shaped kibbles*, Procter teaches a kibble size not greater than "about ½ inch (average of measurements in the three dimensions)". Procter is wholly drawn to preparing dehydrated feedstuffs for animals (col 2, lines 43-45) in the form of kibbles. Therefore, applicant's claim to an extruded kibble, whose size in 3 dimensions, is that which conforms to such a prior art disclosure:

(length) 15mm= 0.59"

(width) 13.5mm= 0.53"

(thickness) 12mm= 0.47"

and is already known in prior art. Compare this with the Hand et al disclosure, a thickness of about 0.32 to 0.70 inch, a diameter of about 0.7 to about 1.2 inch as the most preferred embodiment. Furthermore, it would have been obvious to one of ordinary skill in the art who is looking to use the kibbled product for cleaning tartar, plaque and stain, that the size of a kibble should be optimized based on teeth cleaning benefits and bite size of the pet, since after all Hand et al. teach their shapes which are most desirable for mechanical cleaning efficacy, and based on this, it would not require more than ordinary skill in the art to base the size on such a need too. Since it is common knowledge that all pets do not have the same bite size, then it would have been obvious to optimize such a kibble dimension within those disclosed by the above

references, as necessary for the breed size or age (i.e. puppy, etc.) of the pet's bite size, and with the motivation to provide the tartar reducing function. Note too, that in the absence of any claim herein reciting any particular shape, if the shape were to be adapted to a bone-shape-like product (or "cylindrical" as in Hand et al.), which is the most common shape for pet food chew products, then it would follow that the length would be more than the width.

2. Claims 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hand et al. (US Patent 5431927) and Collings et al. (EP 0645095) in view of Speck et al. (US Patent 6025004) and Procter (US Patent 4259361) and further in view of Staples et al. (US Patent 5000490) or Simone et al. (US Patent 5407661).

The primary references are as described above. Claims 21-24 recite a mixture of different sized kibbles, read on having a mixture of kibbles having striated *and* non-striated appearance (note the "at least one kibble..." language), and claims 21-22 are so recited as to include a product that has a humectant. Since the prior art applied here teach both striated and unstriated appearances, both without humectant, and the size of kibbles can be optimized to about the disclosed sizes by Procter and Hand et al., and while Staples et al. or Simone et al. also disclose a product for oral care that contains a humectant, barring any evidence to the contrary, it would have been obvious to combine a variety of sizes, appearances or textures, include humectants or not, since all of the products would have reasonably been expected to provide the same function and benefit concerning the pet's oral care, since they are all drawn to the oral care of pets.

Art Unit: 1761

Note the ratio of a first any-sized kibble to a second any-sized kibble, 20-80%, which lends evidence to the position here, that there appears to be no criticality in either the variation of size or amount, and that a mixture such as the one claimed, provides a variety of sizes to the pet, since there is no assertion in the specification that doing so produced any patentable result. As for the variation of size, note that Hand et al. states that "the strand is cut into 0.32 to 0.75 inch² and thus it would have been obvious to one of ordinary skill in the art to have provided the pet food of Collings et al. with a variety of sizes within the stated range. The same applies to other dimensions also, when prior art is considered as a whole, i.e. as applied above, because when a range of dimensions is rendered obvious from prior art, to cut an extrudate to any desired length within that range, is not inventive.

Response to Arguments

Applicant's arguments filed 12/4/2006 have been fully considered but they are not persuasive.

The arguments in the Brief are directed to Collings et al. applied under 35 USC 102(b). Since that rejection has now been withdrawn, applicant's traversal of Collings et al. will be addressed only to the extent that the traversal applies to the present rejection.

With regard to the size of the dry pet product, applicant has argued that Collings et al. shows a dimension of a moist extrudate of length 50.1 mm, width 25 mm and depth 9 mm. Further, applicant has included an extensive discussion of "thickness"

being the length, etc. Since Collings et al. have disclosed the dimensions of a moist extrudate, those dimensions are not comparable to those claimed for a dry pet food, as correctly argued by applicant, and they are not being relied upon.

On page 14 of the Brief, applicant has calculated the density of the Collings et al. product based on the dimensions of a sealed, airtight cylinder canister, disclosed at page 6 of the reference. This reasoning is unacceptable, because it is not clear if the pet food fills the entire given dimension of the package or to what extent it fills it. For further discussion please see below with reference to applicant's supplemental declaration filed 8/4/06.

Next applicant states:

Indeed, *Collings* is unconcerned with the density and size of the pet food product to provide a resultant product that can remove more plaque and tartar build-up than similar pet food products. In fact, *Collings* is directed entirely toward an expanded pet food product having improved resistance to breaking, which teaches away from the presently claimed invention. See, *Collings*, page 2, line 52 and page 5, lines 7-9.

Such a position is vigorously disagreed with. Collings et al. is closely related to Hand et al. in its disclosure. Collings et al. addresses the problem thus (see page 2, line 30+):

When it was attempted to adapt the composition and process conditions of SN 07/889,534 to the manufacture of a dog treat food product, that is, a product that was not in a stratified condition, it was determined that the extruded, expanded dog treat product did not have sufficient structural integrity to withstand breakage due to drop impact, i.e., the product could not satisfactorily withstand the impacting internal pressure when the container in which the dog treat product was packaged was dropped during handling and use. (emphasis added)

Art Unit: 1761

Thus, having adapted Hands et al.'s process (i.e. SN 07/889,534 now patent No 5431927), to obtain a product with no striations, Collings et al. is drawn to improving such a product's breakage rate. Thus, Hand et al. and Collings et al. disclose similar ingredients, similar extrusion apparatus, but varying conditions of extrusion that produces a striated product and an unstriated product in each case, respectively.

Also, at page 14, applicant states, with regard to the Supplemental declaration and calculations at page 14:

Nevertheless, Appellants respectfully submit that the calculations were based on reasonable assumptions regarding the overall product and packaging. For example, although the calculations did not consider the possible air space between the pet food product (which could decrease the density), the calculations balanced this by leaving out the thickness and mass of the package itself in determining the total volume and mass (which could increase the density). As a result, Appellants' previous density calculations reflected an approximate estimate of the density of the pet food product in *Collings*.

Applicant's "assumptions" and then "leaving out" certain measurements to accommodate his "assumptions", so as to arrive at a density of 12 lbs/cu ft., do not contribute to "facts" that can be relied on so as to determine, unequivocally, that these claims are patentably distinct over the applied reference(s). A close examination of the supplemental declaration and its "Density calculations" shows it is replete with "What if's", "Lets assume", "Scenario"s and "Suppose". Applicant is reminded that this is a declaration that is being weighed for facts that should provide sound reasons that distinguish the claimed invention over art of record. The supplemental declaration only

Art Unit: 1761

provides assumptions, scenarios, "what ifs" and hypotheses, obfuscating facts and rendering the issues even more nebulous. It is not even clear how these assumptions were made or arrived at. The declaration is self-serving and does nothing to establish patentability.

At page 15, applicant continues to maintain that Collings et al. is concerned with producing an "expanded pet food product similar to a low density puff product that tends to melt in the mouth". First, if indeed Collings et al. has an expanded pet food product, so does applicant, see instant specification at page 9, lines 15-16 that states thus. Next, the entire Collings et al. reference has been carefully reviewed and there is no disclosure of any product melting in any mouth. This is, therefore, unsubstantiated and if the Collings et al. product does so, so too should applicant's based on the fact that it too is expanded, according to the Specification.

At page 15, applicant states that since Collings fails to disclose a method of extrusion through a non-laminar flow, and then by correlating a non-laminar flow with an unstriated product, applicant concludes that Collings et al. is drawn to a *striated* product, as in Hands et al. This cannot be further than the truth for the following reasons:

First, Collings et al. as stated above, discloses:

When it was attempted to adapt the composition and process conditions of SN 07/889,534 to the manufacture of a dog treat food product, that is, a product that was not in a stratified condition, it was determined that the extruded, expanded dog treat product did not have sufficient structural integrity to withstand breakage due to drop impact, i.e., the product could not satisfactorily withstand the impacting internal pressure when the container in

Art Unit: 1761

which the dog treat product was packaged was dropped during handling and use. (emphasis added)

Second, none of the conditions shown in Hand et al. in order to make a striated product, is disclosed by Collings et al. for its product. To quote:

By maintaining the inner walls of the passageway at a coefficient of friction no greater than 0.2, and preferably about 0.04 to about 0.1, conditions resembling laminar flow are believed to be induced during the extrusion of the plasticized fiber containing food product of the present invention, and as a result, an extrudate having a striated structural matrix is obtained; i.e., the extrudate product has fibrous striations transversely aligned through the product microstructure.

To maintain the walls of the discharge passageway at a coefficient of friction of no greater than about 0.2, the walls are desirably coated with a coating material such as polytetrafluoroethylene which has a coefficient of friction of less than about 0.2. Polytetrafluoroethylene coating materials have a coefficient of friction in the range of about 0.04 to about 0.1 are available commercially from E.I. Dupont de Nemours under the trademarks Teflon and Silverstone. Teflon has a coefficient of friction of about 0.04. Silverstone has a coefficient of friction of about 0.1.

Typically, a condition resembling laminar flow is obtained in the extrudate of the present invention by passing the plasticized food ingredient mixture, heated to a temperature of about 240.degree. to about 320.degree. F. and preferably about 270.degree. to 300.degree. F. at a relatively low velocity, e.g. about 12 to about 20 in./sec., preferably about 13 to about 17 in./sec. and most preferably about 14 to about 16 in./sec., through a discharge passageway having a length of about 2 to about 4 inches and a diameter of at least about 0.35 inches and preferably about 0.5 to about 0.75 inches, the inner walls of the passageway being coated with a layer of polytetrafluoroethylene.

(Hand et al., col. 3, lines 63+ onto col. 4).

Third, and most importantly, applicant himself acknowledges that Collings et al. is drawn to an unstriated product and that Hands et al. is to a striated product. See the Declaration filed 2/3/2006 at paragraphs 5 and 7.

Again, Collings et al. addresses the problem that even Hand et al. has disclosed with the unstriated product:

When it was attempted to adapt the composition and process conditions of SN 07/889,534 to the manufacture of a dog treat food product, that is, a product that was not in a stratified condition, it was determined that the extruded, expanded dog treat product did not have sufficient structural integrity to withstand breakage due to drop impact, i.e., the product could not satisfactorily withstand the impacting internal pressure when the container in which the dog treat product was packaged was dropped during handling and use. (emphasis added)
Collings et al. (page 2, lines 30-37)

In contrast, fiber-containing food products which are extruded under conditions of turbulent flow contain the fibrous ingredients randomly distributed in the food product. Such food product, when chewed by an animal, crumbles rather than fractures and exerts limited mechanical cleaning action on the animal's teeth.
Hands et al. (col. 3, lines 50-54)

The above disclosures therefore clearly establish that Collings et al. is drawn to improving the unstrained product so as to make it breakage resistant, and correspondingly it follows, so that when chewed by the animal it would exert mechanical cleaning action on the animal's teeth because of this improvement.

On page 16, applicant states that the Collings product does not disclose an inner cellular structure or the microscopic air pockets. However, since the product of Collings et al. is to an unstriated product, then it follows that the product has the same characteristics as claimed. It is well settled that a patent cannot be properly granted for [an invention] which would flow naturally from the teaching of the prior art. *American Infra-Red Radiant Co. v Lambert Indus., Inc.*, 360 F.2d 977, 986 [149 USPQ 722 (CCPA 1958)], (8th Cir.) (quoting *Application of Libby*, 255 F.2d 412 [118 USPQ 194 (CCPA 1958)], *CERT. DENIED*, 385 U.S. 920 [151 USPQ 757](1966).

On page 16, applicant also points to the Figures in both patents to Hand and Collings, and states that since they are the same, then Collings et al. is drawn to a striated product. As discussed above, this is strenuously disagreed with for the same reasons as above, and further, from the disclosure of both references, it is clear that even if the apparatus is the same, it is the differing conditions used that produce the unstriated product. See the rejection above and the discussion above as well as the references to Hand et al, as discussed in this paragraph.

The remaining pages of the Brief continue to argue the same points as discussed above, and therefore, the same response applies. In addition, to the argument presented by applicant, that Collings et al. is to a striated product also, note that the declaration makes of record that the declarant acknowledges Collings et al. is drawn to an unstriated product. See Declaration filed 2/3/06 paragraphs 5 and 7.

Finally at page 20, applicant states:

The cited references fail to disclose a pet food comprising at least two different sized kibbles including a first sized kibble and a second sized kibble

wherein the first sized kibble is larger in size than the second sized kibble, wherein the first sized kibble and the second sized kibble are present in a ratio of approximately 20 to about 80% to approximately 80 to about 20% as required, in part, by independent Claim 21. For example, Hand discloses a finished product where a uniform extruded strand is cut into thick disc-shaped pellets of the same length.


Claim 21, as stated in the rejection, recites a mixture of different sized kibbles, read on having a mixture of kibbles having striated *and* non-striated appearance (note the "at least one kibble..." language), and claims 21-22 are so recited as to include a product that has a humectant.

When Hand et al. makes it sufficiently clear that a range of dimensions for the product is possible for the purpose of cleaning teeth, and when applicant claims kibble sizes that read within the range in all its sizes, then, preparing the same sizes and mixing them is not patentable. Note too that by claiming such a mixture of products, with no size mentioned in claim 21, and dimensions that read on the applied prior art in claim 22, that contain humectant as in claims 21-22, and that may be striated as well as unstriated ("at least one kibble having a striated appearance" (claim 21)), applicant cannot argue for patentability of his product over prior art products, since such claims establish no unobviousness over such products, but in fact, establish how functionally equivalent they are, by their being used together.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Sayala whose telephone number is (571) 272-1405. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


C. SAYALA
Primary Examiner
Group 1700.